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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ANGEL GARCIA,<br>Defendant and Appellant. | G042130<br>(Super. Ct. No. 08ZF0020)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Landendorf and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The court did not err in its evidentiary or instructional rulings. The prosecutor did not commit misconduct. We affirm.

I

FACTS

A jury found defendant Angel Garcia guilty of two counts of first degree murder for murdering Angel Secundino and Gabriel Perez. For each of the murders, the jury found it to be true the special circumstances requirements of Penal Code section 190.2, subdivision (a)(3)[1] and section 190.2, subdivision (a)(22) were met. The jury found the gang allegation under section 186.22, subdivision (b)(1) to be true for both murders. The jury found it to be true defendant discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1) in committing both murders.

The jury also found defendant guilty of the attempted murder of Fernando Garcia.[2] As to the attempted murder, the jury found it to be true he acted with willful premeditation and deliberation within the meaning of section 664, subdivision (a), found the gang allegation true, and found defendant discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1).

Defendant was also found guilty of street terrorism. The court sentenced defendant to two consecutive sentences of life without the possibility of parole plus 50 years to life in prison.

*Percipient Witnesses*

In the late afternoon of December 17, 2006, 16-year-old Fernando Garcia, 14-year-old Angel Secundino, 14-year-old Gabriel Perez and 13-year-old Vanessa Diaz were at Fernando's house drinking and smoking marijuana. At about 4:30 p.m., they

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1 All statutory references are to the Penal Code.

2 Because Fernando Garcia has the same last name as defendant, he is called Fernando in this opinion to avoid confusion.

walked down an alley to pick up Fernando's little brother who was with a babysitter. None of the four had any weapons. Fernando was a member of the Lopers, a criminal street gang. Both Secundino and Perez "hung around Lopers, but were not officially initiated into the gang." The alley where they were walking was nearby but not within the territory of the Lopers gang.

As the four walked, a black Chrysler 300 approached them. Fernando described what happened next: "The car stopped and two guys got out from the passenger seat and the backseat of the car and they approached us. And they — we were arguing and then I was the first one to get shot so I don't remember. When I woke up, I saw my two friends laying down. They were already dead."

Later, Fernando told investigators those in the car said "we're from Walnut," and someone from his group responded, "this is Lopers." Immediately thereafter, the shooting started.

Fernando knew defendant by the name of Mono. He said he was one of the shooters.

Diaz recognized the person in the front passenger seat as "Mono from Walnut," another street gang. She saw Mono shoot Perez in the head. During the trial, Diaz identified defendant as the person she knew as Mono.

During the shootings, a "bullet came out of Gabriel's head and struck" Diaz, and she "blacked out." When she got up, she saw Perez "bleeding from his ears. His brains were coming out." She ran to call an ambulance.

Jose Luis Cervantes, who "shared a cell" with defendant at the Theo Lacy Facility for three weeks, saw defendant writing the name Mono a couple of times. Defendant told Cervantes he was an active member of the Walnut Street gang, and that he "would go around promoting his gang." Defendant also told Cervantes about an incident "where he told me that he had a gun and he shot towards some people."

*Forensic Evidence*

Rocky Edwards, a forensic firearm and tool mark examiner for the Santa Ana Police Department, examined cartridge cases and a bullet recovered from the scene. He said they came from two different firearms. He testified the bullet found at the scene was fired from "the revolver booked into evidence in package number 25."

The parties reached the following stipulation regarding defendant's DNA: "It is hereby agreed and stipulated between the parties that on October 15th, 2008, Santa Ana Police Department forensic scientist M. Perez obtained a DNA sample from defendant Garcia in the form of a mouth swab. The swabbing was done in a medically approved manner and according to protocols accepted in the scientific community. [¶] M. Perez was properly trained to administer the swabbing. The swabs were properly maintained in evidence package 20060503650069."

Joseph Jaing is a forensic scientist with the Orange County Sheriff's Department. He analyzed the DNA taken from the cartridges recovered at the scene and the swabs taken from defendant. He found "there are at least a minimum of two individuals that were present on that cartridge." He was unable to eliminate defendant as the major contributor of DNA on the cartridges.

*Gang Expert*

Matthew McLeod is a detective assigned to the gang detail at the Santa Ana Police Department. He testified a gang gun is owned by the gang and "possessed at different times . . . by the members of the gang [and] the access to that gun is open to all validated gang members. It is a gun that is passed around throughout the gang, talked about, everyone knows about it and it is a gun that is protected due to the fact it is the property of the gang and not an individual." The person carrying a gang gun has a higher status.

McLeod described the territory where the shootings occurred, stating it is presently claimed by the Lopers gang. The Lopers gang is rivals with the Walnut Street gang. He said the Walnut Street gang qualifies "under the definition of a criminal street gang under California law."

The primary activities of the Walnut Street gang as of the date of the crimes "would be vehicle thefts, assaults with deadly weapons, inclusive of murder." Two Walnut Street gang members, Juan Roldan and Jose Olivo, committed a carjacking in October or November 2008. In 2005, Edward Horidia, another member of the gang, was prosecuted for taking a vehicle without the owner's consent. In 2004 or 2005, Juan Roldan, along with other Walnut Street gang members, was arrested "in regards to a stolen vehicle."

With regard to assaults including murder, McLeod stated a victim named Jose Cardenas, a member of a different gang, was shot and killed on March 24, 2006. Witnesses reported the perpetrators shouted out "Walnut Street" before the killing. McLeod said investigation of that case is ongoing, and the suspects are Walnut Street gang members. On April 1, Eric Romma and Jairo Tamayo "were in the process of committing a robbery and conspiracy to commit an assault" when the would-be victims shot and killed them. On June 10, 2006, several Walnut Street members shot and killed Esteban Cuellar. Later, McLeod testified he arrested another active participant of the Walnut Street gang for a June 10, 2006 murder.

Through a background check and review of reports on defendant, McLeod is familiar with him. McLeod testified defendant "was definitely an active participant in the Walnut Street criminal street gang on [December 17, 2006.]"

McLeod described how the police are familiar with defendant. Defendant's brother, Gabriel, told the police in 2001 that the two had been involved with gangs for the prior six months, and that defendant was also known as Mono. The police have had numerous field interviews with defendant over the years. On July 26, 2002, when

defendant was 13 years old, he admitted "to kicking back with Walnut for over five months." During another interview in July 2002, defendant said he had been "hanging with Walnut" since he was nine or 10 years old. On January 5, 2003, the officer wrote defendant was a "known Walnut Street gang member for over three years." On February 21, 2003, defendant was interviewed with three other gang members. On October 17, 2003, defendant no longer claimed affiliation with the Walnut Street gang, but said he "still knows all the Walnut Streeters."

On January 13, 2004, defendant claimed to have the street name of Little Man and be from the Walnut Street gang. On February 28, 2004, defendant said he "kicks back with Walnut Street." On March 27, 2004, defendant was wearing a silver necklace with the initials C.W.R. when he spoke with the police. McLeod told the jury the initials stood for Spanish words which translate into "an expression of dominance that stating that they are above all others or control all others."

On June 5, 2004, defendant was in a vehicle accompanied by Juan Roldan. McLeod said Roldan was well respected in the gang and defendant's presence with him was an indication of defendant's "level within the gang." The expert explained that "[u]sually you will find the lower ranking members set aside until they prove themselves worthy enough to associate with the higher ranking members." He also found it significant that the location of the contact was near the residence of Roldan, "a well known Walnut Street gang hang out, crash pad . . . ." McLeod said Roldan is also connected with the instant case, and that a gun was found at his residence during the investigation.

On July 25, 2005, defendant was again in a car with another Walnut Street member of high standing, Norberto Hernandez. McLeod spoke with Hernandez in connection with this case. During that interview, Hernandez acknowledged he was a Walnut Street gang member and gave statements about how crimes benefit the gang.

On September 5, 2005, defendant was found in possession of burglary tools and permanent magic markers. McLeod explained: "The possession of these burglary tools or different items of contraband that he had go to or speak to the primary activity of Walnut Street gang members, being the taking of vehicles without owner's consent." On October 6, 2005, defendant claimed he "used to kick it with Walnut."

On August 23, 2006, defendant was once again in the company of Hernandez when the police made contact with him. During that contact, Hernandez said defendant's street name is Mono. The last contact defendant had with the police before the instant shootings was on September 18, 2006. At that time, he told the police blue was the gang color of Walnut Street.

When Hernandez and defendant spoke with the police on August 23, 2006, Hernandez had the phone numbers of several other Walnut Street gang members on his cell phone. One of those phone numbers was for gang member Marco Perez.[3] During the investigation of this case, Marco Perez told the police how the instant crime provided benefit to the gang. McLeod said: "He told us that for he and the other Walnut Street gang members present during the commission of this crime that it benefited them by gaining more respect for the Walnut Street gang having assaulted rivals."

McLeod also interviewed another Walnut Street gang member named Guadarama who was involved in the instant crimes. Guadarama admitted he was part of the two murders and the attempted murder. According to Guadarama, Walnut Street gang members were out hunting for enemies.

McLeod described the primary benefits Walnut Street gang gains from the commission of the instant crimes: "Primarily being the garnering of respect. This is not only respect by or garnered from or in relation to other allies of the Walnut Street gang, but also other rivals and area gangs. It shows the lengths to which the members or

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[3] Because one of the victims and Marco Perez have the same last name, Marco Perez's full name is used throughout this opinion.

perpetrating members of Walnut Street gang will go to to, I guess, continue the rivalry or assault rivals of that gang. [¶] Secondarily, due to the fact that two individuals lost their lives it also lessens the number of maybe future individuals who might take up arms against Walnut Street gang members. And that is the ultimate goal is for, in my experience, is to eradicate all members of a rival gang for varied purposes, to take over that area or assume that area, absorb it for drug trade or what have you or just to prove gang or specific gang members dominance in that subgang culture."

II

DISCUSSION

*Cervantes' Testimony*

Defendant argues the court "violated Evidence Code section 352 and [his] Fourteenth Amendment right to a fair trial by permitting Jose Cervantes to testify that [he] stated he had been involved in several gang shooting incidents and shot at people in an unrelated incident." The Attorney General says the trial court acted within its discretion, but in any event, if there was error, it was harmless.

The prosecutor asked Cervantes: "Did Mr. Garcia also tell you he had been involved in several shootings?" Defense counsel objected: "352 and relevance grounds." The court informed counsel it did not intend "to limit the jury's consideration of this statement. I find it to be probative as, one, as to the 186, but I don't find there's anything about the statement that the jury could not consider as it relates to the 187."

When Cervantes' testimony resumed, the prosecutor asked if, "in speaking with Mr. Garcia at the jail, did Mr. Garcia admit to you to being involved in several shootings while in defense of or promoting his gang?" The witness answered in the affirmative. The prosecutor asked what details defendant provided, and Cervantes said: "Well, he — he didn't pull it on somebody, but he shot towards somebody. That's what he said."

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cain* (1995) 10 Cal.4th 1, 33.)

For purposes of analysis, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) "The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. [Citation.] Moreover, the trial court's ruling under section 352 will be upset only if there is a clear showing of an abuse of discretion. [Citations.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66.)

Here the court took counsel and the reporter into chambers and permitted each side to argue. It is clear from the court's analysis, that prior to ruling the evidence admissible, the court carefully considered the unique facts of defendant's case and the charges against him. Under the circumstances in this record, we cannot conclude the court abused its discretion.

At trial, both Fernando and Diaz identified defendant as the shooter. The erroneous admission of evidence of a crime which was not charged is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Leon* (2008) 161 Cal.App.4th 149, 169.) Even if Cervantes' testimony was more prejudicial than probative, which we do not find, any error was harmless.

The fundamental premise of due process requires that a party be afforded an opportunity to examine and respond to evidence, which may deprive him or her of life, liberty, or property. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15.) The admission of evidence, even if erroneous, results in a federal due process violation only when it renders the trial fundamentally unfair. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.)

While the court did conclude Albarran's trial was fundamentally unfair, the facts in the instant case greatly differ from *Albarran.* In *Albarran*, there was "nothing inherent in the facts of the shooting to suggest any specific gang motive" in that there was no evidence the shooting was done because of a gang rivalry or to gain respect. (*People v. Albarran, supra,* 149 Cal.App.4th at p. 227.) Here there was an announcement the shooters were from the Walnut gang. There was evidence the Walnut gang was a rival of the victims' gang and the crimes were committed to gain respect for the Walnut gang. We conclude that under the circumstances in this record defendant's trial was not rendered fundamentally unfair by the admission of Cervantes' testimony.

*Cross-examination of Fernando*

Next defendant contends the trial court erred in precluding cross-examination of Fernando "regarding whether he normally carried a weapon, in violation of [defendant]'s Sixth and Fourteenth Amendment right of confrontation and his Fourteenth Amendment right to a fair trial. The Attorney General responds that the questions asked were irrelevant.

Defense counsel questioned Fernando as follows:

"Q. Before you went into a boxing stance, did you reach into any of your pockets?

"A. I don't remember.

"Q. Okay. It appeared like you had to think about that for a while. Do you know if you reached into any of your pockets or you don't know?

"A. I don't know if I did.

"Q. Did you have a weapon on you that day?

"A. No.

"Q. Would you normally carry a weapon on you?" At that point, the prosecutor objected on the basis of relevance and the trial court sustained the objection.

"'Relevant evidence' is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (*People v. Leon* (2010) 181 Cal.App.4th 452, 461.) "The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]'" (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) The trial court has wide discretion in deciding the probative value of particular evidence. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1024.) A court has discretion to exclude evidence of speculative and marginal impeachment. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1166.)

Defendant points to nothing in the record which indicates the relevancy of whether or not Fernando normally carries a weapon. Nor does he point out any offer of proof made to the trial court. Just as in this case, the defendant in *People v. Lomax* (2010) 49 Cal.4th 530, argued the trial court erred in curtailing his cross-examination of a witness, thus violating his constitutional rights. The *Lomax* court held to the contrary, noting "the trial court properly prevented counsel from asking questions that lacked a good faith basis and invited jury speculation on claims that would not be given any evidentiary support." (*Id.* at p. 580.)

Under the circumstances here, we cannot find any error. The court merely closed off speculative and marginal impeachment.

*Witness Credibility Instruction*

The next contention of defendant is that the trial court erred "by giving an incomplete instruction on witness credibility." He claims his rights under the Fourteenth Amendment were violated because the instruction did not "cover Fernando Garcia's criminal conduct."

The following are questions and answers between defense counsel and Fernando:

"Q. Are you in jail?

"A. Yes.

"Q. Why?

"A. For violations.

"Q. Violation of what?

"A. Drugs.

"Q. Okay. Do you have a felony conviction?

"A. No.

"Q. Okay. Are you convicted of some offense? At that point, the prosecutor's relevance objection was overruled.

"Q. "Have you been convicted of some offense?

"A. No.

"Q. Well –

"A. It was just like – I was in my neighborhood when I got arrested and I only got arrested for two violations for dirty drug tests of meth and marijuana and that's it.

"Q. Are you on probation for something?

"A. Yes.

"Q. For what?

"A. For having a weapon.

"Q. What kind of weapon?

"A. Knife. Pocket knife.

"Q. Okay. You were convicted of that?

"A. Yes."

The court instructed the jury with CALCRIM No. 226. On appeal, defendant complains the court did not include the following bracketed language in the instruction: "Has the witness engaged in [other] conduct that reflects on his or her believability?"

When the court and counsel discussed the jury instructions prior to the court instructing the jury, the following colloquy took place: The court: "As to 226, I'm looking at what we typically refer to as bracketed material. But I know we have had at least one witness convicted of a felony, Mr. Cervantes. I do not recall that we've had any Wheeler-type conduct offered for purposes of evaluating credibility so it would be the court's thought that the bracketed material, 'Has the witness engaged in other conduct,' will not be given. Do you have a different view?" Defense counsel: "Yes. The one witness said he was convicted of a knife, but I don't know that that would not be moral turpitude." The court: "It would be the court's intention not to give that."

A testifying witness may be impeached with nonfelony conduct involving moral turpitude.[4] (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) The trial court has discretion to determine whether nonfelony conduct amounts to moral turpitude. (*People v. Jones* (1998) 17 Cal.4th 279, 304.) Defendant has offered no authority which states a conviction for possession of a pocket knife involves moral turpitude. Nor is there authority cited which stands for the proposition the court abused its discretion or that defendant was prejudiced when the court refused to include the bracketed language in CALCRIM No. 226. Under these circumstances, we conclude the court did not err.

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[4] Defendant says the record does not state whether defendant was convicted of a felony or a misdemeanor.

*Alleged Prosecutorial Misconduct*

Finally defendant claims "blatant misconduct" by the prosecutor. The Attorney General says the prosecutor's comment "was based on evidence in the record and did not constitute impermissible vouching for the witness."

Fernando was the last witness to testify before the lunch break. During redirect examination by the prosecutor, the following questions and answers were asked and answered:

"Q. Okay. Now, I need to walk over this way for a minute. As I walk to right here I can't see you anymore, correct?

"A. Yeah.

"Q. Can you see me?

"A. No.

"Q. Okay. I need you to lean forward and I need you to look at me. Sir, can you lean forward and look at me? Okay. Now, as you're looking over here, just a simple yes or no, do you see Mono?

"A. No.

"Q. Do you recognize this person?

"A. No.

"Q. Okay.

"[Defense counsel]: Could the record reflect she was indicating my client?

"The court: Yes. The record will reflect that the prosecutor was standing behind the defendant.

"Q. You know Mono, correct?

"A. Yeah, but it's not him.

"Q. Are you afraid of identifying him?

"A. No.

"Q. You've seen him before today; correct?

"A. Not today. Only right now, but I don't – he doesn't have this.

"Q. Back then he didn't have a mustache; correct? Back in December of 2006; is that right?

"A. He didn't have – I don't know if he –

"[¶] . . . [¶]

"Q: Is it correct you don't want to identify him?

"A: "Yeah."

The first witness after lunch was Joe Kim, a gang investigator with the district attorney's office. He said he spoke with Fernando over the lunch period, and Fernando said he did not identify defendant in court because "he was afraid of retaliation and recently he had received calls from his mother that the same car, unknown car, has been driving back and forth on his street and he's in fear for his mother's safety, not his."

During his argument to the jury, the defense lawyer stated: "[Fernando] is in court where you can all see him where it counts. And he's under oath where everyone can judge his credibility and whether he's being honest or not. And he's questioned there on the witness stand under oath. And he says it's not Angel Garcia. He looks at my client and says it's not him. I don't see the guy who was involved in the shooting. Supposedly, after we all leave and we can't see him and he's not under oath and not subject to cross-examination, now he says, oh, yeah, I think it was him. Okay. Supposedly he's afraid. Supposedly after he's shot he makes some sign it was Walnut and that some guy named Juan Roldan was involved in the shooting, was a Walnut Street gang member. So if he wasn't afraid right after the shooting, suddenly he's afraid. I don't think that adds up. I think there's something suspicious about that."

When the prosecutor attempted to rebut defense counsel's argument, she stated: "How about [Fernando] refusing to identify the defendant? Well, think about that. He hid over there in the witness stand. When I walked over and stood behind the defendant, I couldn't see any part of his body. He's hiding. He is so scared of this. He's

so intimidated by this that when I forced him, basically, to look at him, he said, no, he's not here. He's not here. And immediately after — when we broke for lunch and I approached him and I said well, was he here? And he says to my investigator, yeah, he's here but I can't, I can't identify him, I can't identify him. [¶] You heard from Joe Kim, how scared he was. Intimidated. Of course. I mean, that's logical, ladies and gentlemen. It's horrible that people have to go through this, but that's part of the gang culture too. He didn't identify because he was scared."

'"Prosecutorial misconduct implies the use of deceptive or reprehensible methods to persuade either the court or the jury.' [Citations.] 'It is not necessary to show bad faith, but it is necessary to show the defendant's right to a fair trial was prejudiced [by the claimed misconduct].' [Citation.] 'The ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred.' [Citations.]" (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 390-391.) A prosecutor may make assurances regarding the honesty or reliability of a witness based on facts in the record. (*People v. Turner* (2004) 34 Cal.4th 406, 432.)

Here the prosecutor's argument was based on reasonable inferences from facts in the record. Even if the prosecutor had improperly argued, and we do not find that to be the case, defendant has shown no prejudice. The record shows evidence from which a reasonable inference can be drawn that, while Fernando testified it was Mono who shot him, he was afraid to point his finger at defendant because he thought his mother's safety was in jeopardy.

We cannot say a result more favorable to the defendant would have resulted had the prosecutor not made the statements she did. Under these circumstances, we certainly do not find prosecutorial misconduct under the more onerous federal standard.

## III

## DISPOSITION

The judgment is affirmed. The clerk of the court is ordered to correct the minute order, which states defendant pled guilty, to accurately state defendant was convicted by a jury.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.